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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 466.

UNITED STATES OF AMERICA,

Petitioner,

vs.

DANIEL M. LEFKOWITZ and PAULINE PARIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion of the District Court (R. 43) is reported in 47 F. (2d) 921. That of the Circuit Court of Appeals (R. 56) is reported in 52 F. (2d) 52.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 21, 1931 (R. 61). The petition for certiorari was filed October 16, 1931, and was granted November 30, 1931 (R. 62). Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

By an independent proceeding, initiated by an order to show cause (R. 2), signed and served before any indictment had been filed or a Commissioner's hearing had been had (R. 9, 11), respondents made an application in the United States District Court for the Southern District of New York for the suppression of evidence and the return of all books, papers, correspondence and records seized upon a search of room 604, 1547 Broadway, New York City (R. 2). Said room 604 was the office of "The Southern Agency," which was the trade name of the respondent Daniel M. Lefkowitz (R. 13). Respondent Pauline Paris, a stenographer, was an occupant of the office (R. 2).

The order to show cause was directed to the United States Attorney for the Southern District of New York (R. 2) and was supported by the affidavits of the respondents (R. 2-8). The United States Attorney for the Southern District of New York appeared in opposition to the order to show cause, submitting affidavits of a Deputy United States Marshal, of the Special Agents of the Department of Justice, Bureau of Prohibition, and of the Assistant United States Attorney in charge of the case (R. 9-36). As exhibits to the said affidavits a certified copy of the complaint before the Commissioner and the warrant of arrest issued thereon (R. 37-43) were filed, together with a copy of an indictment filed in the United States District Court for the Southern District of New York after the aforementioned order to show cause had been signed and served (R. 9). Said indictment named as defendants the respondents herein and one Herman Bernstein (R. 12-15).

All of the papers and articles seized at the time of the search and seizure were submitted to the District Judge by the United States Attorney (R. 44). Said papers and articles were not printed in the record, but were before the Circuit Court of Appeals in their original form pursuant to stipulation (R. 55).

The search and seizure followed the filing of a complaint before United States Commissioner Garrett W. Cotter (R. 37-42), who thereupon issued a warrant for the arrest of Henry Miller, "Jane Doe," "Richard Roe" and "John Doe" for an alleged violation of Section 37 U. S. C. C. (R. 42-43). The warrant was executed by a Deputy United States Marshal in the company of Special Agents of the Department of Justice, Bureau of Prohibition, on the afternoon of January 12, 1931 (R. 16). Of the persons named in the warrant only two were arrested and arraigned. The "Henry Miller" designated in the warrant was arraigned as Daniel Lefkowitz, and the "Jane Doe" named in the warrant was arraigned as Pauline Paris (R. 43).

At the time the order to show cause issued, the other persons referred to in the warrant had not been apprehended. One Benjamin Williams, who was not named in the warrant, but who was on the premises when the warrant was executed, was also taken into custody (R. 43). Williams subsequently testified before the Grand Jury, and was discharged upon motion of the Assistant United States Attorney (R. 11).

The arrests were made in a room 20 feet long and 10 feet wide. The office, divided by a partition, was fitted up with two desks and other articles of office furniture (R. 20, 23-24). Other than certain documents found on the person of respondent Lefkowitz (R. 10), all of the books, papers and articles seized were found in one or another of the pieces of furniture in the premises (R. 5, 24, 25, 35). The papers so seized were first kept in custody by the Special Agents, but after the service of the order to show cause were turned over to the Assistant United States Attorney, Ulysses S. Grant, upon whom due demand was made for their return, which said demand was refused (R. 7, 10).

Special Agent Olivera was the first to enter room 604 in 1547 Broadway. Lefkowitz and Williams were the only persons then in the room. Olivera remained at the entrance to the suite (R. 19). Immediately after his entry

into the premises he gave a prearranged signal to Special Agent Delmore (R. 32), who notified the other agents waiting on the floor below and within two minutes from the time Olivera entered the room the other agents joined him there (R. 17, 19, 23, 32).

As the agents entered, Lefkowitz was standing at the door of the inner office. He was identified as the Henry Miller in the warrant by Olivera and the Deputy United States Marshal placed him under arrest, at which time he gave his name as Daniel Lefkowitz (R. 17). No copy of the warrant was given to Lefkowitz at this time or at any other time (R. 6).

Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to the Deputy United States Marshall certain papers and articles. After the arrest these were turned over to Assistant United States Attorney Grant (R. 10, 17, 20, 25, 32-33).

The search of Lefkowitz's person concluded, the Special Agents conducted an exploratory investigation throughout the premises, indiscriminately seizing papers, documents and records from all of the articles of furniture therein contained (R. 20, 23, 25). During the progress of the search of the outer office, respondent Pauline Paris entered and was placed under arrest (R. 17, 19, 20).

Not only were the desks in the office ransacked (R. 5-6, 20, 23-25, 35), but the agents rummaged through a towel cabinet and waste paper baskets (R. 35), taking every scrap of documentary evidence, including even raffle books belonging to respondent Paris (R. 3). In order to obtain evidence of the signature and typewriting of respondent Paris, she was directed to type a letter to the Assistant United States Attorney (R. 3, 21, 24-25). This is further illustration of the exploratory nature of the search.

Although many documents and other records were seized, no receipt of any kind whatsoever was given to the respondents upon the conclusion of the search and seizure (R. 6). Nor was a copy of the warrant of arrest given to respondents (R. 6). Save for a small bottle of

alcohol found in the desk in the inner office (R. 35) no liquor was found in any of the office furniture. A pint bottle of whiskey, taken from the person of Williams, who occupied an office elsewhere in the building (R. 23, 34), had been brought into the premises by him just before Special Agent Olivera arrived (R. 19).

The entire search and seizure was conducted by the Special Agents under the color of their authority and with threats of force (R. 3, 5) over the protest and objection and without the consent, authorization or acquiescence of respondents (R. 6, 7, 46).

Despite the fact that the Special Agents had visited the premises a number of times before the search and seizure (R. 29, 30, 31, 40), and had had ample opportunity to observe whether any contraband liquor was kept within these two small offices, no application for a search warrant was made (R. 20). Upon the arraignment the Commissioner condemned the unlimited and rummaging search for documentary evidence (R. 6). The Special Agents justified their conduct as the incident to a lawful arrest, frankly admitting a search for evidence of criminality (R. 20).

Upon the completion of the search and seizure, respondents were arraigned before a United States Commissioner and released on bail pending a hearing (R. 21). Before that hearing the respondents made the application to suppress, etc.

Following an oral argument, the application to suppress, etc., was denied by the District Court (R. 47), which rendered a written opinion (R. 43). Upon appeal, the order of the District Court was reversed by the Circuit Court of Appeals as to all the property seized, except that taken from the person of the respondent Lefkowitz and the letter written by the respondent Paris, on the ground that the search and seizure were unreasonable (R. 56). Circuit Judge Swan, dissenting, expressed the view that the seizure was lawful except as to certain items which appeared to have no relation to the crime with which Lefkowitz was charged (R. 60). This Court granted a writ of certiorari to review the judgment of the Circuit Court of Appeals (R. 62).

ARGUMENT.

The arrests, though lawful, did not justify a ransacking and exploratory search of the premises.

Lawless enforcement of the law by the duly constituted authorities by means of unreasonable searches and seizures is a proposition which this Court has always severely criticized and discountenanced (*Weeks* v. *United States,* 232 U. S. 383; *Silverthorne* v. *United States,* 251 U. S. 385).

In *Silverthorne* v. *United States, supra,* the Court said:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

This Court has repeatedly refused to lend the weight of its authority and give the stamp of its approval to general exploratory searches for evidence. Such searches have been deemed violative not only of the protection afforded against unreasonable searches and seizures by the Fourth Amendment, but also as violative of the guaranty against compulsory self-incrimination embodied in the Fifth Amendment (*Boyd* v. *United States,* 116 U. S. 616; *Gouled* v. *United States,* 255 U. S. 295; *Marron* v. *United States,* 275 U. S. 192).

While the respondents were lawfully taken into custody under the color of a warrant for their arrest (R. 42-43), nevertheless such a circumstance is no basis in fact or in law for a thorough-going ransacking and rummaging of the premises in which the arrest takes place (*Go-Bart Importing Co.* v. *United States,* 282 U. S. 344).

Boyd v. *United States*, 116 U. S. 616, first enunciated the rule that a wholesale seizure of documents constituted an unreasonable search and seizure. In succeeding decisions this Court has repeatedly reaffirmed this principle (*Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 398; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298; *Agnello* v. *United States*, 269 U. S. 20; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Cf. Hale* v. *Henkel*, 201 U. S. 44).

These principles have been vigorously enforced in the Circuit Court of Appeals and in the District Courts (*Flagg* v. *United States*, 233 F. 481 [C. C. A., 2d]; *In re 191 Front Street*, 5 F. [2d] 282 [C. C. A., 2d]; *United States* v. *Kirschenblatt*, 16 F. [2d] 202 [C. C. A., 2d]; *United States* v. *1013 Crates, etc.*, 52 F. [2d] 49 [C. C. A., 2d]; *United States* v. *Mills* [D. C., N. Y.], 185 F. 318; *United States* v. *Mounday* [D.C., Kan.], 208 F. 186; *United States* v. *Epstein* [D. C., N. Y.], 33 F. [2d] 982; *United States* v. *Kraus* [D. C., N. Y., 1921], 270 F. 578; *United States* v. *Rembert* [D. C., Tex., 1924], 284 F. 996). See also *Haywood* v. *United States*, 268 F. 795, 803 (C. C. A., 7th, 1920).

These cases involve in one way or another the limit of a search of the premises where a lawful arrest took place. Uniformly they condemn the practice of general exploratory searches for evidence of criminality.

All of these cases involve an interpretation of the Fourth Amendment to the Constitution of the United States. It provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Two separate and distinct prohibitions are contained in the amendment. It prohibits unreasonable searches and

seizures of any kind or character, however made. It interdicts, secondly, the issuance of search warrants except where probable cause exists and where the search warrant is upon oath or affirmation and contains a particular description of the place to be searched and the persons or things to be seized. This has been the uniform construction of the Fourth Amendment by this Court in all cases that have arisen under it. The most recent enunciation of this interpretation is to be found in *Go-Bart Importing Co.* v. *United States, supra,* at pages 356 to 357. The amendment has also been so interpreted in the lower Federal Courts. Of these cases, *United States* v. *Snyder* (D. C., W. Va., 1922), 278 F. 650, 652; *O'Connor* v. *United States* (D. C., N. J., 1922), 281 F. 396, 397; *United States* v. *Rembert, supra,* are examples.

Go-Bart Importing Co. v. *United States, supra,* involved the scope of a search and seizure of premises similar to those in the case at bar as an incident to a lawful arrest and without a search warrant. This Court, in the course of its opinion, condemning the search and seizure as unreasonable, in no uncertain language interpreted the Fourth Amendment to cover an unlawful search and seizure made as an incident to a lawful arrest. Mr. Justice Butler wrote as follows at pages 356 to 357 of 282 U. S.:

> "The first clause of the Fourth Amendment declares:
>
> > 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. Gouled v. United States, 255 U. S. 298, 307, 41 S. Ct. 261, 65 L. Ed. 647. The second clause declares: 'And no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'
>
> This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. Agnello v. United States, 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement less there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623. Weeks v. United States, supra, 389-92."

That the Fourth Amendment was directed against the evil of the writs of assistance and general search warrants, which had been so vehemently contested prior to the Revolution, is a fact too well known to need more than passing reference. The historical background has been lucidly set forth in the opinion of Mr. Justice Bradley in *Boyd* v. *United States, supra.* To prevent the repetition of the general and exploratory searches for evidence of criminality which had been perpetrated under the protection of those devices, to prevent the unlimited seizure of a man's papers and property was the guiding principle of that amendment. "We must never forget," said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, "that it is a Constitution we are expounding." To delimit the constitutional protection against unreasonable searches and seizures to those made under the guise of a search warrant, as is contended by the Solicitor General in the brief for the United States (pp. 37-40); is to emasculate the amendment and to strip it of its efficacy. So interpreted, the amendment would be reduced to a form of words and it could be evaded as the occasion arose for evasion.

Although the framers of the Constitution may never have had searches incidental to a lawful arrest specifically in their minds at the time the Fourth Amendment was made a part of the Constitution, nevertheless it cannot be argued from that fact that such searches are not covered by the Fourth Amendment. This Court has always interpreted the Constitution as a living document, intended to meet modern conditions (*Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387). See also the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U. S. 438, 471. It is argued that the search incidental to a lawful arrest is totally different from the type of search aimed at by the Fourth Amendment because the entry of the officers in such a case is lawful, whereas when the entry is made by virtue of an invalid search warrant, it is unlawful. However the argument may be phrased, it needs only a reference to the *Go-Bart* case to show that it is fallacious. In that case this Court expressly assumed that the arrests had been lawfully made, but nevertheless this Court held the search and seizure to have been unreasonable. The situation is precisely the same in the case at bar.

Go-Bart Importing Co. v. *United States*, 282 U. S. 344, is the most recent application of the doctrine by this Court to a case involving a search made as an incident to an arrest. Bartels, the secretary and treasurer of the corporation, was in the company's office in New York City when the Special Agents arrested him. His person was searched. Gowen, the president of the company, subsequently entered the office and was arrested and searched. Keys were found on his person, and the Special Agents directed him to open a desk and the safe in the office from which papers were taken. From other parts of the office, papers, journals, account books, letter files, insurance policies, canceled checks and index cards were taken. The Government claimed that Gowen and Bartels sold intoxicating liquors and that at the company's office they exhibited and took orders for intoxicating liquors, some

of which were delivered there and some of which was delivered elsewhere. The office of the Go-Bart Importing Co. consisted of a suite of three rooms. Approximately a dozen bottles of assorted intoxicating liquors were found on the premises in addition to the papers and documents. No search warrant had issued and this Court considered the warrant of arrest as insufficient on its face, but assumed, as the lower courts had held, that the arrests were lawful and valid. In discussing the validity of the search and seizure, Mr. Justice Pierce Butler, referring to the search and seizure, stated (282 U. S., at 358):

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. * * * Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306."

Marron v. *United States*, 275 U. S. 192, is the only case decided by this Court which may in any way support the principles urged by the Government. That case, however, is not contrary to the decision in *Go-Bart Importing Co.* v. *United States*. There was no general exploratory search such as occurred in the *Go-Bart* case or in the case at bar. Prohibition officers having a search warrant entered a speakeasy and arrested one Birdsall, who was in charge of the place. Marron was not then present. The agent

searched for and found large quantities of liquor. In the course of the search they came upon a grey ledger in a closet on the premises. Beside the cash register they found a number of bills for electric light, gas, water and telephone service furnished on the premises. They seized the grey ledger and the bills. Marron petitioned for the suppression of this evidence. His petition was denied, and the evidence was admitted upon the trial over his objection and exception. Marron was convicted. The case came before this Court on a writ of certiorari. This Court held that the seizure of the grey ledger and the bills was not authorized by the search warrant (275 U. S. 192, 198). It was held, however, that as an incident to the lawful arrest that the agents could contemporaneously search the premises "in order to find and seize the things used to carry on the criminal enterprise * * *." This Court held that the grey ledger was part of the equipment actually used to commit the offense of maintaining a nuisance and that it was in the "immediate possession and control" of Birdsall. Mr. Justice Butler said at page 199:

> "The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."

By this language this Court did not mean to sanction general exploratory searches for evidence, as is apparent from the language in which Mr. Justice Butler distinguishes the *Marron* case from the *Go-Bart* case. He states at page 358 of 282 U. S. as follows:

> "Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident of the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside

the cash register. These things were visible and accessible and in the offender's immediate custody. *There was no threat of force or general search or rummaging of the place.*" (Italics ours.)

The absence of a general exploratory search was emphasized by the Attorney General of the United States in his brief in opposing the petition for a writ of certiorari in the *Marron* case. At pages 11 to 12 in that brief, *United States* v. *Kirschenblatt, supra,* was distinguished in the following manner:

> "* * * but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for *certiorari* to review that decision.
>
> There was in the instant case no rummaging among defendant's papers for incriminating evidence.
>
> * * * They had no warrant for the seizure of papers, nor was any general search made therefor. The documents seized were incidentally discovered while the officers were searching for liquor."

The sharp criticism by this Court of the outrageous nature of the search and seizure in the *Go-Bart* case is indicative of the fact that this Court has not departed from the principles which first found expression in *Boyd* v. *United States.* In that case this Court held unconstitutional a statute which required a defendant to produce in court his private papers, invoices and books in a forfeiture proceeding, and for failure so to do, to have the allegations in the libel taken as confessed. Mr. Justice Bradley thoroughly examined the historical background underlying unreasonable searches and seizures, and wrote as follows:

> "The search and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different

> things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained or of using them as evidence against him. The two things differ *toto cœlo*. In the one case the government is entitled to the possession of the property; in the other it is not * * *. By the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property. * * *
>
> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense. It is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

As was said by Judge Chase in the majority opinion of the Circuit Court of Appeals for the Second Circuit in the case at bar, the *Go-Bart* case is controlling here. Judge Chase wrote as follows (R. 58-59):

> "One of these, and the only one we need to mention now, is the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. The legal principles which protect all men equally loom as large at one time as at another, and forbid the

search and seizure. Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States*, 275 U. S. 192, 488 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. Indeed this case differs in its essential facts from that one so slightly that what is said in that opinion characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

It is argued by the Solicitor General (pp. 39-40) that there is a distinction between a search authorized by a search warrant and a search authorized by a lawful arrest and the Court below failed to recognize this distinction. Such a distinction does not in fact exist. General exploratory searches for evidence have always been condemned by this Court, whether they are incidents of a lawful arrest or pursuant to a search warrant. *Gouled* v. *United States, supra,* is an example of this assimilation of doctrine. In that case certain papers were seized under a search warrant. Mr. Justice Clarke wrote as follows, at page 309 of 255 U. S.:

"Although search warrants have thus been used in many cases ever since the adoption of the constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless, it is clear, at common law, and as the result of the *Boyd* and *Weeks* cases, *supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted to only when a primary right to such search and seizure may be found in the interests which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders a possession of the property by the accused unlawful and provides that it may be taken."

In the case at bar the officers had ample time to obtain a search warrant if their real purpose was to search for contraband. The officers had probable cause to make an arrest and obtained a warrant of arrest. They would not have been impeded in the performance of their duties if at the same time that they obtained the warrant of arrest they had obtained a search warrant. This Court has held that, wherever possible, a search warrant and a warrant of arrest should be employed by the arresting officers. See *Carroll* v. *United States, supra.* This was not done in the case at bar because the officers knew that they could not obtain a search warrant for the evidentiary material which they sought. See *Kirvin* v. *United States, supra,* and *United States* v. *Kirschenblatt, supra.* This is further illustration of the unreasonableness of the search and seizure in the case at bar.

General exploratory searches for evidence are within the proscription of the Fourth Amendment even where there is not an actual physical rummaging of the premises. *Hale* v. *Henkel,* 201 U. S. 44; *Boyd* v. *United States,* 116 U. S. 616. In *Hale* v. *Henkel,* it was held that a subpoena *duces tecum* which was too broad in its scope would be construed to constitute an unreasonable search and seizure, contrary to the Fourth Amendment. Upon analogous principles, this Court restricted the power of the Federal Trade Commission to compel the production of records for inspection and making copies. *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298. Writing for a unanimous bench, Mr. Justice Holmes declared (264 U. S., at 305, 306):

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions in the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479, 14 Sup. Ct. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

* * * * * * *

> "It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335."

Weeks v. *United States*, 232 U. S. 383, is another illustration of the application of the rule. There, the search and seizure had been made without the authority of a search warrant. The defendant had previously been arrested without a warrant by State police officers, who thereupon went to his home and searched the premises, turning over papers seized to the United States Marshal. A second search was made the same day by the United States Marshal in the company of the police officers. This Court held that this wholesale seizure of papers was so unreasonable that, if upheld, it would render the protection of the Fourth Amendment of no value.

With the same principles in mind as to the limitations upon the scope of a search and seizure upon a lawful arrest, the Circuit Court of Appeals for the Second Circuit held a search and seizure of documents under circumstances similar to those in the case at bar to be illegal in *United States* v. *Kirschenblatt*, 16 F. (2d) 202.

In that case the special agent, with a search warrant for a general search of the premises, went to the defendant's offices, arrested him and made a thorough search thereof. A small amount of liquor and a large quantity of papers, including account books, customers' lists and letters, were seized. Holding that the search warrant and the arrest were legal, the Circuit Court of Appeals stated that the only question was that as to the scope of the search under the warrant or as an incident to the arrest.

Judge Learned Hand wrote as follows, at page 203 of 16 F. (2d):

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will

convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which they makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

He concluded as follows at page 204:

"It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, except by a thorough search of all that the offender has, to allow which would be to countenance exactly what the amendment was designed to prevent. Therefore, while we agreed that it is no answer to a search to say that papers have been seized, we cannot agree that the power extends beyond those which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not.

The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. *But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon such search warrant.*" (Italics ours.)

In an earlier case the Circuit Court of Appeals for the Second Circuit held that a search warrant directing the seizure of "any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors" was improvidently issued and that the said search warrant must be quashed and everything seized thereunder returned, and the evidence suppressed (*In re 191 Front Street,* 5 F. [2d] 282). The records and documents seized in that case included books, papers and records consisting of memoranda, telegrams, invoices, receipts and various letters. It was held that these papers and documents were not instruments of crime, but merely some evidence of crime, and could not be seized as an incident to the arrest since "the distinction has been recognized between what one carries about on his person and what one keeps in his house."

Nor are exploratory searches countenanced merely because the fruits thereof are contraband (*United States* v. *1013 Crates, etc.,* 52 F. [2d] 49 [C. C. A., 2d]). There admittedly contraband property had been seized without a search warrant; the agents sought to justify it as incident to a lawful arrest. Condemning the search, Circuit Judge Chase wrote as follows:

> "They [searches] are unreasonable, and because so, unlawful when the arrest may fairly be said to have been but an excuse for a general exploratory search. Such searches are uniformly without the law whether conducted under the pretended authority of a search warrant or in the guise of a mere incident of a lawful arrest. *Go-Bart Co.* v. *United States,* 282 U. S. 344. * * * No period of freedom from such an evil, however long it may be, should lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however beneficial."

In *United States* v. *Mills* (D. C., N. Y., 1911), 185 F. 318, a decision antedating the *Weeks* case by three years, the defendants had been lawfully arrested for a conspiracy

to violate the Customs Law. At the time of their arrest the United States Marshal searched for, seized and removed from the premises a quantity of documents concerning the alleged fraudulent importation and all other business of defendants. Subsequently these papers came into the possession of the United States Attorney. Upon petition, the return of all seized papers was directed, Lacombe, D. J., holding that such a comprehensive seizure of documentary evidence in the premises where an arrest is made constituted an unreasonable search and seizure in violation of the Fourth and Fifth Amendments. The subsequent history of the case is illuminating. It came to this Court upon a writ of error and this Court dismissed the writ for lack of jurisdiction (*Wise* v. *Mills*, 220 U. S. 549 [1911]; see also *Wise* v. *Henkel*, 220 U. S. 556 [1911]). In its decision this Court intimated that were the case properly before the Court, it would affirm the order below, because the search and seizure was unreasonable. Thereafter a writ of error was dismissed by the Circuit Court of Appeals of the Second Circuit for the reason that the order was interlocutory, but that Court also stated that it did not approve of unlimited exploratory searches (189 F. 583).

Flagg v. *United States*, 233 F. 481, also involves the scope of a search and seizure upon an arrest. There, too, after the arrest of the defendant a wholesale search and seizure was made of all the books and papers in the premises where the arrest was made. There, too, no search warrant authorized the seizure and the Circuit Court of Appeals for the Second Circuit held that "the constitutional rights of the defendants were violated by the unlawful seizure of his books and papers by the officers and agents of the United States, acting without warrant or pretense of legal authority."

A further illustration is to be found in *United States* v. *Mounday*, 208 F. 186. After arresting the defendants under a warrant for violations of the Postal Laws, a search was made of the office in which the arrest was made and

a large volume of letters, writings and documents were carted away. No search warrant there authorized the wholesale and indiscriminate seizure of these books and papers. The District Court held that there was no right of any kind or nature to justify such a search and seizure and that it involved a "flagrant violation of defendant's conceded constitutional rights" and that the fruits of the unreasonable search and seizure must therefore be suppressed.

In the case at bar the special agents made a most thorough and ransacking search of the premises at 1547 Broadway. From an examination of the very affidavits with which the Government sought to oppose the application in the District Court, there is a clear indication that no portion of the premises was overlooked in the Government's anxious search for incriminatory evidence. Even Special Agent Olivera, who claimed to have been on the premises prior to the date of the arrest and search and seizure, could not, in his affidavit, nor in his complaint, state that liquor was stored on the premises in any manner whatsoever. The discovery of a small bottle of alcohol is insignificant, since this Court can take judicial notice of the fact that this substance is very useful in the proper care of typewriters. The liquor found on the person of Williams was not purchased on the premises, but was purchased elsewhere, and it cannot be therefore maintained that Section 33 of Title 27, United States Code, which reads, in part, as follows:

> "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this chapter * * * is hereby declared to be a common nuisance,"

is applicable, since in no uncertain terms it is limited to cases where intoxicating liquor itself is sold or stored on the premises. Therefore, when Olivera entered the premises it cannot be said that the respondents herein were engaged pursuant to a conspiracy in maintaining a com-

mon nuisance in room 604. Nor does Olivera's statement of a pre-arranged appointment aid in the showing of a commission of a conspiracy in the presence of the agents. It is not one of the overt acts set forth in the indictment, and so far as the record shows, the interview alleged there was never even commenced, no less consummated, by reason of the entry of the special agents almost immediately after Olivera's entrance.

At the time the respondents were arrested the conspiracy upon which the complaint was based had already been consummated. The agents did not, nor could they see conspiracy being committed. In this respect the case is on all fours with the *Go-Bart* decision. The Government knew that there was no liquor on the premises. An effort was made to discover evidence which would substantiate and uphold the allegations set forth in the complaint before the Commissioner.

Consequently, in total disregard of every inhibition placed upon the acts of the Government officials by history, by the Constitution and by the Courts, the Government agents proceeded to make a most thorough and ransacking search of the premises. This Court cannot disregard the fact that the special agents themselves admit a search for evidence, that Olivera had time to secure a search warrant, but, strangely enough, failed to do so. Though the premises were small and limited in space, no possibility was left unexplored. The agents stopped at nothing. They asserted that a drawer of one of the desks was open and that the others were not locked (R. 20), but it is not necessary to constitute a rummaging and ransacking search that the Government unlock a desk or other place where the document seized is kept. Such a proposition is totally at variance with common sense and ordinary principles of justice. A search is no less exploratory and no less abhorrent to constitutional principles because the Government agents do not break down doors or unlock desks, safes or other places of storage. The principles here involved were erected as safeguards from ransacking of personal documents in indiscriminate fashion. The *Go-*

Bart case is not distinguishable on this ground alone, for, as has hereinbefore been noted, in the *Go-Bart* case not all of the property was taken from locked depositories.

What was done in the case at bar emphasizes the fact that it was "based solely with purpose to gain nothing but information generally which may, perhaps, be proof that a crime has been committed" (Chase, C. J., in the majority opinion herein).

That the arrest was but an excuse for a general exploratory search is emphasized by the fact that not only were two desks opened, ransacked, and the papers they contained seized, but a towel cabinet was searched and papers in it seized. Waste-paper baskets were emptied and scraps of paper taken from them and later pasted together. The conclusion is inescapable that the special agents conducted a "fishing expedition" to determine what, if anything, they could find to incriminate the respondents herein. The deceptive manner in which the letter was obtained from the respondent Pauline Paris is but another *indicia* of this intent on the part of the special agents.

That the papers and documents seized herein are not instruments of crime is indicated by a comparison of the documents seized in the case at bar and those seized in *Go-Bart Importing Co.* v. *United States, supra,* in *United States* v. *Kirschenblatt, supra,* and in *In re 191 Front Street, supra.*

In all of these cases the papers and documents were books of account, memoranda and other papers of a nature that inescapably connected them with the business alleged to have been carried on in the premises in which the seizure was made. Nevertheless, this Court did not hesitate to condemn the search and seizure in the *Go-Bart* case. It did not put its opinion upon the ground that these things might have been instrumentalities of crime or contraband, but by its condemnation of its search and seizure in that case this Court reiterated the proposition that "a general exploratory search in the hope that evidence of crime might be found was unwarranted, illegal

and contrary to all principles of justice." Nor do we concede that the seized papers and documents herein were instruments of crime. At best, they are but evidence of the fact that some crime may have been committed.

At the time of the seizure, the special agents knew no facts upon which they could base an opinion that the documents were instrumentalities of crime. If such a claim now is made, it is only because of some knowledge obtained after the search and seizure. Knowledge obtained after an unlawful search and seizure cannot be used to justify the search and seizure (*Byars* v. *United States*, 273 U. S. 28).

The argument of Judge Swan in his dissenting opinion that items 2, 3 and 4 and 10 were unrelated to the crime and therefore should be returned would, if carried to its logical conclusion, permit a general exploratory search, a sifting of evidence seized and an ultimate return of whatever the Government found useless. How totally at variance this proposition is with constitutional principles is apparent on its face.

The documents in the case at bar were seized under circumstances so similar to those under which the seizure was made in the *Go-Bart* case that its doctrine must apply. The test laid down in the *Marron* case that things "in the offender's immediate custody" are seizable is as inapplicable here as in the *Go-Bart* case.

While the respondents might have had knowledge as to where to find this or that paper, that fact was equally true in the *Go-Bart* case, but nevertheless the seizure was condemned.

Much reliance is placed by the Government upon the case of *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. (Ex. Div., Ire.) 245 (Brief of United States, pp. 21-24). When the facts in that case are closely analyzed, a total disparity will be noted between them and those in the case at bar. There, the papers seized were actually being used at the time the arrest was made. There was no rummaging and ransacking. The books and papers taken were on a desk in the hands of the man arrested in the *O'Brien*

case, and consequently might be said to have been on his person. Whatever general language was used in the case must therefore be limited to its actual facts.

It is also stated that this Court has approved *Dillon* v. *O'Brien and Davis, supra*, in *Weeks* v. *United States, supra* (Brief, p. 25). But when the language quoted from the *Weeks* case is examined, it will be seen that this Court cited *Dillon* v. *O'Brien and Davis* only for the proposition that the person of the accused might be searched upon his arrest.

The Government cites at pages 25 to 27 of its brief, *Carroll* v. *United States*, 267 U. S. 132, 158; *Agnello* v. *United States*, 269 U. S. 20, and *United States v. Lee*, 274 U. S. 559, 563. These cases do not sustain the right of agents to make an exploratory search for evidence.

Thus, in *Carroll* v. *United States*, 267 U. S. 132, 158, there was no rummaging or ransacking and the Court simply stated that where there is a legal arrest, whatever is found in the control of the defendant "which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." There is a distinction between books and papers which are evidences of a crime and which in and of themselves are not illegally possessed, and contraband where the *res* itself is illegitimately possessed.

United States v. *Lee*, 274 U. S. 559, did not even involve a search. Mr. Justice Brandeis wrote as follows, at page 563:

> "But no search on the high seas is shown. * * * It is not shown that there was any exploration below decks or under hatches."

Agnello v. *United States*, 269 U. S. 20, merely states that the fruits of a crime, weapons and things to effect an escape as well as things connected with the crime, "as the means by which it was committed," may be seized. The books and documents herein are not the means by which the crime may have been committed, but merely evidence of the manner in which the Government claims a crime was committed.

Attempt is made to distinguish the *Go-Bart Importing Co.* v. *United States, supra,* from the instant case (Brief for the United States, pp. 32-35). But the distinction pointed out is without any difference. That one of the respondents had an appointment with Special Agent Olivera merely shows the pretext used to obtain entry to the premises. It does not mean that the crime was actually in progress, because before any discussion was had the arrests were made. That the agents had recent knowledge of the existence of the conspiracy to violate Title 27 of the United States Code only strengthens their position as to the existence of probable cause and has no other effect.

It is further urged that no fraudulent claims were made, that no force was used and that no desks were unlocked. But the search was made under the pressure of the official authority of the officials. This amounted to coercion (*United States* v. *Rembert, supra*). Force was used, although the agents deny it. Finally, the breaking into of locked depositories is matter of aggravation of the unreasonableness. The lack thereof does not indicate a reasonable search.

While in the *Go-Bart* case no warrant of arrest existed, the arrests were assumed to be valid.

For these reasons we deem the *Go-Bart* case controlling on the facts herein, and that the search herein was an unreasonable one.

There is no substantial conflict between *Marron* v. *United States,* 275 U. S. 192, and the decision of the Circuit Court of Appeals in the case at bar. The *Marron* case did not involve any rummaging or ransacking; what was there found was discovered in the execution of a search warrant for contraband and in good faith. There was no attempt made to explore the premises for incriminatory evidence under the guise of executing the search warrant.

The rule that a search may be made as an incident to a lawful arrest is and must be subjected to the limitation that the arresting officers must refrain from rummaging and ransacking without pretense of right. They must not

search for evidentiary material when they have no probable cause to believe that contraband is on the premises. Where there is a sale of contraband immediately before the arrest, and a search warrant cannot be obtained with due diligence, then, perhaps, a search without a warrant may be made. That is not the case at bar, however. The lack of this factor is emphasized by the fact that while the officers had time to get a warrant of arrest, they did not obtain a search warrant. Had they possessed the requisite probable cause for such a search warrant, one could have been issued under Title 27, Section 39, United States Code, or under the Search Warrant Act (Title 18, Sec. 612 *et seq.*, U. S. Code). It is therefore apparent that the arresting officers went on a fishing expedition for evidence after they had made the arrests. This is plainly unreasonable and unlawful. Nor will the limitations placed upon arresting officers by the Circuit Court of Appeals affect searches for contraband, for under the statutes already mentioned a search warrant can be obtained to search for and seize contraband.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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